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May 14, 1999

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 98-141

Dear Ms. Salas:

EX PARTE OR LATE FILED

At the request of the Commission's staff, this letter provides a brief response to the applicants' claim that the loss of a large ILEC as a potential benchmark is not significant due to the presence of numerous small ILECs.

The applicants argue that their merger would not harm the Commission's ability to employ benchmark regulation because the large number of smaller, independent ILECs will continue to provide sufficient benchmarks for measuring the performance of the major ILECs. This argument is inconsistent with the well-documented use of benchmarking as a regulatory tool, and it is contrary to the basic thrust of the applicants' arguments in support of the merger.

Simply put, in order to apply benchmark regulation, a regulator necessarily must determine that the available comparators are "useful" in that they are "comparable" or "similarly situated" for the purpose of the regulatory issue in question. If differences between comparators are significant, however, benchmarks become more difficult (and perhaps impossible) to employ. At the very least, differences in size must be taken into account in employing small ILECs as benchmarks for larger ones. In many other instances, the differences in size may represent differences in kind, so that small ILECs are useless as benchmarks for larger ones. Indeed, the parties themselves press upon the Commission the idea that the merged entity would be sufficiently different from the present SBC that opportunities available to the merged entity are denied SBC at present. And, large ILECs are likely to resist proposals that they conform their behavior to that of small ILECs precisely on the grounds that they are not similar.

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That there are significant differences between large and small ILECs is demonstrated clearly by the fact that many of the Commission's regulations apply differentially to ILECs based upon the size of the regulated entity. For example, Tier 1 ILECs¹ historically have been regulated more pervasively than smaller ILECs. Smaller and rural ILECs today benefit from exemptions and reduced regulatory obligations under both the statute and the Commission's rules.² Indeed, a bipartisan group of 16 members of Congress recently submitted a letter to the FCC supporting regulatory obligations for midsized telephone companies less stringent than those applied to the RBOCs and GTE.³

The Commission's application of benchmarking also illustrates that diversity of approaches to regulatory issues among several large ILECs is critical to the Commission's ability to regulate. For example, the Commission's *Shared Transport* decision compares the position taken by Ameritech with the common position of Bell Atlantic, NYNEX, and PacTel.⁴ Here, the Commission clearly compared the practices of large major ILECs for the purpose of establishing ILEC obligations under section 251 and did not look to the experience of smaller independent ILECs.

Reliance on comparisons of behavior among large ILECs is entirely justified, and, upon reflection, fairly obvious. The networks operated by the large ILECs are more comparable to each other than they are to those of smaller carriers because of their

¹ "Tier 1" or "Class A" ILECs are defined as those ILECs with \$100 million or more in annual revenues from regulated activities.

² See, e.g., 47 U.S.C. § 251(f) (establishing certain exemptions from obligations under section 271 for rural telephone companies and providing that small telephone companies (those with fewer than two percent of U.S. access lines) may seek suspension and/or modification of certain section 251 obligations).

³ See Communications Daily, at 7, (May 12, 1999).

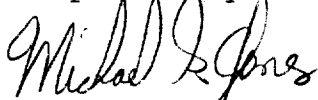
⁴ In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, n.77 (Aug. 18, 1997).

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common history and development as well as their similar physical layouts. The large ILECs serve more areas that are developed and that have greater population density. In the case of the RBOCs, these areas are contiguous across multi-state regions. In these circumstances, the Commission can more confidently advance regulations that would require large ILECs to make changes in network design to which another large ILEC has already agreed, or to require other changes. Similarly, the economic profile of the large ILECs, including factors such as size, capitalization and capital and operating budgets, are generally comparable; thus, the Commission can be reasonably certain that their costs are similar. In contrast, independent LECs tend to serve areas that are smaller, non-contiguous, more rural and more heavily subsidized, making such comparisons problematic for many purposes.

An original and one copy of this submission is being provided herewith. Please do not hesitate to contact the undersigned (202-429-4787) should you have any questions.

Respectfully submitted,



Michael G. Jones

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